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84-905
No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

TEXAS AMERICAN BANK and VINCENT E. DRAIN, as Independent Co-Executors of the Will of Milous Jackson Mitchell, Deceased - - - - - Petitioners,

versus

LEW C. SAYERS - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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December 4, 1984

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment permits the exercise of specific jurisdiction under Kentucky's "long arm" statute in a suit filed in Kentucky by one Texas resident against another Texas resident to enforce an alleged oral agreement involving stock in an Illinois bank, when the defendant contends that the cause of action does not arise from the transaction of business in Kentucky by the defendant?

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IN THE

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October Term, 1984

No. _____

TEXAS AMERICAN BANK and
VINCENT E. DRAIN, as Independent Co-Executors of the Will of Milous Jackson Mitchell, Deceased - - *Petitioners,*

v.

LEW C. SAYERS - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The Petitioners, Texas American Bank[1] and Vincent E. Drain, as Independent Co-Executors of the Will of Milous Jackson Mitchell, Deceased, who were the Appellants in the court below, respectfully petition for a

[1]The following information is presented pursuant to Supreme Court Rule 28.1: Texas American Bank is a wholly owned subsidiary of Texas American Bancshares, Inc. ("Bancshares"). Affiliates of Texas American Bank are the wholly owned and partially owned subsidiaries of Bancshares, which are Texas American Life Insurance Company, American AgCredit Corporation, Texas American Services, Inc., Texas American Investment Management, Inc. and the following corporations, each of whose full name is in the form "Texas American Bank/_____": Allen, Amarillo, Austin, Breckenridge, Dallas, Denison, Duncanville, Farmers Branch, Fondren, Fort Worth, Forum, Fredericksburg, Galleria, Greater Southwest, Gulfway, Houston, Las Colinas, LBJ, Levelland, Longview, McKinney, Midland, Plano, Prestonwood, Richardson, Spring Branch, Temple, Town North, West Side, Westlake and Wichita Falls. Texas American Bank has no subsidiaries other than wholly owned subsidiaries.

writ of certiorari to review the Opinion of the Kentucky Court of Appeals, which has been made final by an Order of the Kentucky Supreme Court.[2]

OPINIONS BELOW

The Order of the Kentucky Supreme Court declining to review the Opinion of the Kentucky Court of Appeals was entered on September 5, 1984 [App. A]. The Opinion of the Kentucky Court of Appeals was entered on May 18, 1984 [App. B]. The Findings of Fact, Conclusions of Law and Judgment of the Daviess County, Kentucky Circuit Court were entered on April 6, 1983 [App. C]. None of the opinions below is officially or unofficially reported.

JURISDICTION

The opinion sought to be reviewed was entered May 18, 1984, and became final on September 5, 1984. *See,* footnote 2, *supra.* The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

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[2]The Kentucky Supreme Court denied the Petitioners' motion for discretionary review under Kentucky Civil Rule 76.20, which provides that the Kentucky Supreme Court may in its discretion review opinions and orders of the Kentucky Court of Appeals. Under Kentucky Civil Rule 76.30(2)(b), the Opinion of the Kentucky Court of Appeals became final immediately upon denial of the motion for discretionary review. Because the Kentucky Court of Appeals was the highest court of Kentucky which ruled on the merits, the writ of certiorari should be directed to that court. *See, Callender* v. *Florida,* 380 U. S. 519 (1965) and 383 U. S. 270 (1966).

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

Kentucky Revised Statutes 454.210 [App. D].

STATEMENT OF THE CASE

I. Proceedings In The Courts Below.

This case is based on a single telephone conversation that allegedly occurred on July 18, 1975. The Respondent, Lew C. Sayers ("Sayers"), was then serving as chief executive officer of Owensboro National Bank ("Owensboro National"), in Owensboro, Kentucky. The Petitioners' decedent, Milous Jackson Mitchell ("Mitchell")[3] was then the majority shareholder of Owensboro National. Mitchell was then, and had been continuously since the 1960's, a resident of Texas. Sayers claims that Mitchell called him from Texas and told him that the First Bank & Trust Company ("First Bank & Trust") in Mt. Vernon, Illinois, of which Mitchell was also the majority shareholder, was in danger of being closed by the bank regulators. According to

[3]Mitchell died shortly after the trial was completed, and the Petitioners were substituted as Defendants in the Daviess County, Kentucky Circuit Court before final judgment was entered by that court.

Sayers, Mitchell asked Sayers to negotiate the sale of Mitchell's stock in Owensboro National, resign as chief executive officer of Owensboro National, become chief executive officer of First Bank & Trust, and keep First Bank & Trust open. Mitchell allegedly said that if Sayers performed these services, Mitchell would pay Sayers one-half of any profit from any subsequent sale of Mitchell's stock in First Bank & Trust.

Sayers negotiated the sale of Mitchell's Owensboro National stock, which was Mitchell's last remaining investment in Kentucky, and moved to Illinois in 1975. Sayers resigned from First Bank and Trust in 1978 and moved to Texas, where he has resided since that time. In 1981, Sayers demanded that Mitchell acknowledge the alleged 1975 oral agreement. Mitchell denied that any such agreement ever existed, and Sayers filed this suit in the Daviess County, Kentucky Circuit Court in November, 1981. Mitchell was served by mail in Texas under the Kentucky "long-arm" statute, Kentucky Revised Statutes 454.210 [App. D].

Mitchell responded to Sayers' complaint by filing a motion to dismiss under Kentucky Civil Rule 12.02[4]

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[4]Civil Rule 12.02 provides in relevant part as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (b) lack of jurisdiction over the person, . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion.

for lack of personal jurisdiction, citing, *inter alia*, *Miller* v. *Trans World Airlines*, 302 F. Supp. 174 (E.D. Ky. 1969), a case which relied on this Court's construction of the Due Process Clause of the Fourteenth Amendment in *International Shoe Co.* v. *State of Washington*, 326 U. S. 310 (1945) and other cases [Memorandum Brief in Support of Motion to Dismiss, filed November 30, 1981]. The trial court denied that motion by Order Overruling Motion to Dismiss entered January 6, 1982. After discovery, Mitchell renewed his motion to dismiss, but the trial court orally denied that motion at the commencement of trial.

This case was tried in August and September, 1982. Of the 18 witnesses whose testimony was offered at trial, 15 were residents of Texas, Illinois, or Tennessee. Of the three Kentucky residents called as witnesses, two were offered solely as character witnesses, and the trial court properly refused to allow them to testify as to Sayers' reputation in the Owensboro community because Sayers had not lived in Kentucky since 1975. Of the 15 non-resident witnesses, the testimony of seven was read into evidence from depositions because they were not present in Owensboro for the trial.

On April 6, 1983, the trial court entered Findings of Fact, Conclusions of Law and a Judgment granting the relief requested by Sayers [App. C]. Mitchell's co-

executors appealed to the Kentucky Court of Appeals,[5] raising the federal constitutional issue in their brief to that court. In an opinion dated May 18, 1984, the Court of Appeals affirmed, rejecting the Petitioners' federal constitutional argument [App. B]. By an Order dated September 5, 1984, the Kentucky Supreme Court denied the motion for discretionary review filed by the Petitioners [App. C].

II. The Facts Relevant To This Petition.

A. Mitchell's Banking Investments.

During the 1940's, Mitchell resided and was engaged in the oil drilling business around Mt. Vernon, Illinois. At that time, he began to purchase stock in First Bank & Trust, and by 1975 he owned a majority of the outstanding shares. In the 1960's, Mitchell became a resident of Texas and moved his business office there. Mitchell resided in Texas continuously until his death in 1982.

Between 1970 and 1972, Mitchell purchased a majority of the outstanding shares of Owensboro National as an investment. At the time Mitchell first purchased Owensboro National stock, he recommended that Sayers be hired as chief executive officer of that bank. Sayers was then a resident of Texas who had spent his career with government agencies and banks in Texas.

---

[5]Kentucky Civil Rule 73.01(4) provides in relevant part that "the taking of an appeal from a final order or judgment in any action in which the trial court has denied a defense asserted under Rule 12.02 based upon . . . lack of jurisdiction over the person . . . shall not constitute an entry of appearance in said action in any court by the appellant."

Mitchell had met Sayers in Texas in the 1960's when one of Mitchell's businesses borrowed funds from the Texas bank which employed Sayers.

Mitchell bought the stock of Owensboro National in 1970 with two other investors with borrowed funds. Mitchell testified that he offered Sayers the opportunity to participate in the loan and purchase, but Sayers refused to take that risk. Instead, Sayers asked Mitchell to "carry" an investment in Owensboro National for him. Mitchell orally agreed to "carry" one-third of his Owensboro National stock for Sayers, with Sayers being entitled to receive any profit on the sale of those shares in excess of Mitchell's cost.

B. Sale of Owensboro National Stock.

C. M. Gatton, a Tennessee businessman, learned in June, 1975 that Mitchell was willing to sell his Owensboro National stock, and that Sayers would conduct the negotiations. Gatton met with Sayers in June, 1975, but failed to reach an agreement. Gatton and Sayers met again in July, 1975, and reached agreement after Sayers called Mitchell in Texas and obtained approval of the terms.

The sale of the Owensboro National stock to Gatton was closed in August, 1975. At the end of that month, Sayers resigned as chief executive officer of Owensboro National and returned to Texas, where he bought a house. Sayers requested that his profit under the 1970 oral agreement, which amounted to $751,000, be paid to him in Texas, and Mitchell complied with that request. Since selling his Owensboro National stock to Gatton

in 1975, Mitchell has not owned any property or done any business whatsoever in Kentucky.

C. Sayers' Employment by First Bank and Trust.

During 1974 and 1975, First Bank & Trust encountered serious financial problems. There was a "run" on the bank, and the bank regulators demanded that the President of First Bank & Trust be replaced. In September, 1975, the Board of Directors of First Bank & Trust appointed a search committee to interview applicants for the job. Mitchell arranged for the search committee to meet Sayers, and he recommended Sayers to the Board of Directors. Sayers was hired as chief executive officer of First Bank & Trust by the Board of Directors in October, 1975. Sayers remained as chief executive officer of First Bank & Trust until November, 1978, when he resigned and returned to Texas. Sayers has been retired, and has resided continuously in Texas, since 1978.

In September, 1981, Sayers' Kentucky counsel requested in a letter addressed to Mitchell in Texas that Mitchell sign a written contract acknowledging the alleged agreement. Mitchell responded from Texas with a letter stating that he never had any agreement with Sayers concerning the stock of First Bank & Trust. Sayers then filed this suit in Kentucky.

REASONS FOR GRANTING THE WRIT.

A. This Case Presents a Question Upon Which This Court Reserved Decision Last Term.

This Court recently summarized the constitutional limits applicable to in personam jurisdiction in *Heli-*

copteros Nacionales de Colombia, S.A. v. *Hall*, — U. S. —, 104 S. Ct. 1868 (1984):

> The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert in personam jurisdiction over a nonresident defendant. Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of in personam jurisdiction. It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant. Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation. When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant.
>
> 104 S. Ct. at 1872 (citations omitted).

Sayers has never contended that Kentucky can exercise general jurisdiction over Mitchell in this suit. Instead, Sayers has argued, and the Kentucky Court of Appeals held, that Kentucky can exercise specific jurisdiction over Mitchell on the ground that Sayers' claim against Mitchell "arises from" Mitchell's activities within Kentucky. In *Helicopteros Nacionales de Colombia, S.A.* v. *Hall, supra,* this Court declined to decide what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that a cause of action "arises out of" or is "related to" a defendant's contacts with the forum. 104 S. Ct. at 1873, n. 10. This case presents that question. This Court also declined in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall, supra,* to decide whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum. Although the Petitioners believe that Sayers' cause of action neither "arises from" nor is "related to" Mitchell's contacts with Kentucky, the Petitioners concede that others who view this case from a different perspective might conclude that this case also presents the latter question.

B. Sayers' Claim Does Not "Arise From" the Transaction of Business in Kentucky by Mitchell.

The Court of Appeals held that *Tube Turns Division of Chemetron Corp.* v. *Patterson Co., Inc.,* 562 S. W. 2d 99, 100 (Ky. App. 1978), states the constitutional limits of personal jurisdiction under KRS 454.210 [App. B, 6a]. The decision in *Tube Turns Division*

of Chemetron, Inc. was based on the Sixth Circuit's decision in *Southern Machine Company, Inc.* v. *Mohasco Industries, Inc.*, 401 F. 2d 374 (6th Cir. 1968), which in turn was based on this Court's decisions in *International Shoe Co.* v. *State of Washington*, 326 U. S. 310 (1945), *McGee* v. *International Life Insurance Company*, 355 U. S. 220 (1957), and *Hanson* v. *Denckla*, 357 U. S. 235 (1958). The court in *Tube Turns Division of Chemetron, Inc.* stated the following rule:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the activities of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

562 S. W. 2d at 100.

The Petitioners agree that this rule accurately reflects the current state of the law under the decisions of this Court with respect to the constitutional limitations on the exercise of specific in personam jurisdiction. However, the Petitioners strongly disagree with the holding of the Court of Appeals that the requirements of this test were satisfied in this case.

The Court of Appeals held that Sayers' cause of action arose from the transaction of business in Kentucky by Mitchell. As stated above, this Court declined in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall, supra,* to decide when a cause of action "arises out of"

or is "related to" a defendant's contacts with a forum. However, Petitioners submit that neither the authorities cited by the Court of Appeals nor any other authorities support the conclusion of the Court of Appeals.

First, the Court of Appeals concluded, *citing* 17 Am. Jur. 2d *Contracts* §53 (1964), that this cause of action arose from activities of Mitchell in Kentucky because Mitchell "formed the contract . . . in Kentucky" when Sayers accepted his telephone offer [App. B, 7a]. However, the cited section of this treatise deals solely with state law questions of contractual interpretation. Under the decisions of this Court, the location where a contract is formed for state law purposes has no bearing on the ability of a state to assert personal jurisdiction over a party to the contract. On this very question, the Sixth Circuit has held, relying on two decisions of this Court, that "Legal principles designed for choice of law purposes or for the purpose of interpreting a contract are not sufficient guides for measuring the power of a state to issue process beyond its borders." *Southern Machine Company, Inc.* v. *Mohasco Industries, Inc.*, 401 F. 2d 374, 382 (6th Cir. 1968), *citing Hanson* v. *Denckla*, 357 U. S. 235 (1958) and *Travelers Health Association* v. *Virginia*, 339 U. S. 643 (1950).

The Court of Appeals also concluded that Sayers' claim arose from the transaction of business by Mitchell in Kentucky because the alleged agreement required Sayers to perform the agreement in Kentucky. The Court of Appeals concluded that "The contract caused activity in Kentucky because, pursuant to its

terms, Sayers was required to sell the ONB stock, resign as senior vice president and chief executive officer of ONB, and move from Owensboro to Mt. Vernon, Illinois" [App. B, 7a]. However, the activity cited by the Court of Appeals was activity *of Sayers,* not of Mitchell. This Court has clearly held that a state cannot constitutionally base personal jurisdiction over a defendant on the basis of *the plaintiff's* own acts in the forum state. *Hanson* v. *Denckla,* 357 U. S. 235, 254 (1958).

The fact is that Sayers' cause of action did not arise out of or in connection with Mitchell's buying and selling stock in Kentucky banks, as stated by the Court of Appeals. This cause of action arises entirely out of Mitchell's refusal to perform an agreement, allegedly made by telephone from Mitchell's residence in Texas, to pay Sayers one-half of the profits on the sale of Illinois bank stock. This breach occurred in 1981, six years after Mitchell had transacted any business in Kentucky, and at a time when Mitchell resided in Texas. In these circumstances, the previous transaction of business by Mitchell in Kentucky is irrelevant, even though the alleged oral agreement which was breached could not have existed without the previous transaction of business in Kentucky by Mitchell.

The New York "long-arm" statute, which is similar to Kentucky Revised Statutes 454.210, was so construed in *Rene Boas Associates* v. *Vernier,* 257 N.Y.S. 2d 487 (1965). In that case, the nonresident defendant entered into a written agreement with the plaintiff in New York, thus transacting business in New York. Subse-

quently, the plaintiff claimed that it was entitled to commissions under a later oral agreement. The oral agreement was not negotiated or executed in New York, and the defendant did not perform any act under the oral agreement in New York. The court held that personal jurisdiction could not be asserted over the defendant in New York, even though it had previously transacted business in that state:

> In the absence of any showing that the oral agreement with defendant was negotiated or concluded *by defendant* in New York, or that *defendant* did any other act with respect to the oral agreement in New York, it cannot be said that the cause of action arose from an act of defendant in the transaction of business within the state. *The fact that a prior written agreement was historically necessary to the inception of the subsequent oral agreement does not alone, for purposes of the jurisdiction statute, support personal jurisdiction.* . . . The written contract is inapplicable to plaintiff's claims, and its negotiation and execution by defendant in New York provide no basis for personal jurisdiction (emphasis added).

257 N.Y.S. at 489-90.

Another case reaching the same result is *Xedit Corp.* v. *Harvel Industries Corp.*, 456 F. Supp. 725 (S.D.N.Y. 1978). In that case, the defendant had transacted business with the plaintiff in New York. Subsequently, in New Jersey, the defendant misappropriated trade secrets of the plaintiff. If the parties had not transacted business in New York, the defend-

ant would not have had access to the trade secrets. However, the court held that the previous transaction of business by the defendant in New York was merely "a link in the chain of events leading to the claim for which relief is sought," and the claim did not "arise from" that transaction of business. *Id.* at 729.

If Mitchell had not bought and sold banks in Kentucky, and if Sayers had not been hired to work in one of those banks, Mitchell would not have had occasion to call Sayers in Kentucky concerning employment in Illinois. Thus, Mitchell's banking activity in Kentucky was historically necessary to the alleged oral agreement. However, Sayers' cause of action does not "arise from" the buying and selling of Kentucky banks by Mitchell prior to 1975. The cause of action "arises from" Mitchell's breach in 1981 of an alleged oral agreement which was not negotiated or executed by Mitchell in Kentucky and which did not require Mitchell to perform in Kentucky. Mitchell's buying and selling of Kentucky banks prior to 1975 is a link in the chain of events leading to Sayers' cause of action, but the cause of action does not "arise from" Mitchell's transaction of business in Kentucky.

C. Kentucky Has No Interest in Resolving the Controversy Between Sayers and Mitchell.

The third requirement of the constitutional test—that the controversy have a "substantial enough connection" with Kentucky—is simply not present in this case.

A controversy has a "substantial enough connection" with a particular state if that state "has an interest in resolving the conflict." *Southern Machine Company, Inc.* v. *Mohasco Industries, Inc., supra,* at 381. Here, a Texas resident has attempted to sue another Texas resident in Kentucky for breach of an alleged agreement involving stock in an Illinois bank. When the defendant denied the existence of the alleged agreement in 1981, the defendant was a resident of Texas who had not conducted any business in Kentucky since 1975, and the plaintiff was a resident of Texas who had not resided in Kentucky since 1975. The matter in controversy is the profits from the sale of Illinois bank stock, which profits are now being held in a Texas escrow account. This controversy does not have a substantial connection with Kentucky, and Kentucky has no possible interest in resolving this conflict.

The Court of Appeals cited *First National Bank of Louisville* v. *J. W. Brewer Tire Company,* 680 F. 2d 1123 (6th Cir. 1982), for the proposition that this case meets the third test [App. B, 8a]. This overlooks the fact that the plaintiff in the *First National Bank of Louisville* case was a Kentucky resident at the time the lawsuit was filed. The Sixth Circuit stated in the *First National Bank of Louisville* case that the third test was met because "Kentucky has a substantial interest in seeing that *its residents* get the benefit of their bargain." 680 F. 2d at 1126 (emphasis added). The *First National Bank of Louisville* case obviously has no application to this suit by Sayers, who had been a Texas resident for six years when the complaint was filed.

The Court of Appeals also cited *Davis H. Elliott Co.* v. *Caribbean Utilities Co.*, 513 F. 2d 1176, 1181-82 (6th Cir. 1975), in support of its conclusion that the third test was satisfied [App. B, 8a]. Again, the Court of Appeals completely misread that case. A cursory reading of the *Davis H. Elliott Co.* opinion will indicate that the language of the Sixth Circuit quoted by the Court of Appeals deals solely with the question whether the *first* test—the requirement of purposeful activity in the forum state — was satisfied.

Petitioners have not found, and the Respondent has never cited, a case in which a state was held to have jurisdiction under the third test where a non-resident plaintiff sued a non-resident defendant to enforce an agreement not negotiated or executed in the forum state involving stock in a non-resident corporation.

CONCLUSION

This case presents an important question of federal law upon which this Court reserved decision last term in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall, supra,* and which should be settled by this Court: What sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that a cause of action "arises out of" or is "related to" the defendant's contacts with the forum. 104 S. Ct. at 1873, n. 10. For this reason, and for all the other reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners, Texas American Bank and Vincent E. Drain, as Independent Co-Executors under the Will of Milous Jackson Mitchell, Deceased

PROOF OF SERVICE

The undersigned, the counsel of record for the Petitioners, having been admitted to practice before the Supreme Court of the United States, does hereby certify that three (3) copies of this Petition for Writ of Certiorari were deposited in a United States mailbox, with first-class postage prepaid, addressed to Morton Holbrook, Esq., Holbrook, Gary, Wible & Sullivan, P.S.C., P.O. Box 727, Owensboro, Kentucky 42302, counsel of record for the Respondent Lew C. Sayers, on December 4, 1984. The undersigned further certifies that all parties required to be served have been served.

/s/ Bert T. Combs

BERT T. COMBS

APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

84-SC-462-D
(83-CA-1186-MR)

TEXAS AMERICAN BANK and
VINCENT E. DRAIN, as Independent Co-Executors of the Will of Milous Jackson Mitchell, Deceased - - - - - *Movants*

v.

LEW C. SAYERS - - - - - - - *Respondent*

Daviess Circuit Court
#81-CI-1242

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of Texas American Bank and Vincent E. Drain, as Independent Co-Executors of the Will of Milous Jackson Mitchell, deceased, for a review of the decision of the Court of Appeals is denied.

ENTERED September 5, 1984.

/s/ ROBERT F. STEPHENS
Chief Justice

APPENDIX B

OPINION RENDERED: MAY 18, 1984; 10:00 A.M.
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 83-CA-1186-MR

TEXAS AMERICAN BANK and
VINCENT E. DRAIN, as Independent Co-Executors of the Will of Milous Jackson Mitchell, Deceased - - - *Appellants*

v.

LEW C. SAYERS - - - - - - - *Appellee*

Appeal From Daviess Circuit Court
Honorable Henry M. Griffin, Judge
Action No. 81-CI-1242

AFFIRMING

BEFORE: REYNOLDS and WILHOIT, Judges, PAXTON, Special Judge.

PAXTON, Special Judge. Texas American Bank and Vincent E. Drain, independent co-executors of the estate of Milous Jackson Mitchell,[1] appeal from a judgment of the Daviess Circuit Court, sitting without a jury, which determined that it had personal jurisdiction over Mitchell under KRS 454.210, the "long arm" statute, and that Mitchell and Lew C. Sayers entered into an enforceable oral contract on or about July 17, 1975.

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[1]Mr. Mitchell passed away within a few days after conclusion of the trial.

Mitchell and Sayers were residents of Texas, and acquaintances for several years before Mitchell purchased 36% of the outstanding Owensboro National Bank stock in 1970. Shortly thereafter, Sayers moved from Texas, established residence in Owensboro, and, on Mitchell's recommendation, was appointed to the dual positions of senior vice-president and chief executive officer of ONB. At the time he purchased the ONB stock, Mitchell owned a controlling interest in Central Bank & Trust Company of Owensboro, and a considerable number of shares in First Bank & Trust Company of Mt. Vernon, Illinois. Sayers stayed with ONB until the latter part of August, 1975, and was hired by First Bank & Trust Company as its chief executive officer on October 10th of that same year. He remained with First Bank & Trust Company until November, 1978, when he resigned and moved back to Texas. He was a resident of Texas when he filed this action in the Daviess Circuit Court alleging that he and Mitchell entered into an oral contract on July 17, 1975, and asking the court to require Mitchell to award him 50% of the profits on Mitchell's stock in First Bank & Trust when it was sold. Mitchell moved for dismissal of the action because, inter alia, the Daviess Circuit Court lacked jurisdiction over his person. The trial court denied the motion, and Mitchell then answered, denying the oral contract, and he again asserted lack of personal jurisdiction over him by the trial court.

After several days of trial, the trial court again held that it had personal jurisdiction over Mitchell by virtue of the "long arm" statute, KRS 454.210. The trial court also found that by telephone call of July 17, 1975, from Mitchell in Texas to Sayers in Owensboro, the parties entered into an oral contract which provided that in exchange for one-half of the profit derived from the sale of Mitchell's stock in First Bank & Trust, Sayers would:

1. Negotiate the sale of Mitchell's stock in ONB;
2. Resign his position as senior vice-president and chief executive officer of ONB;
3. Move to Mt. Vernon, Illinois, and take the position of chief executive officer of First Bank and Trust Company; and,
4. Keep the First Bank & Trust Company open, or, "get the ox out of the ditch."

Based upon its findings of fact and conclusions of law, the trial court entered judgment that:

> Sayers is entitled to one-half the profits from the sale of Mitchell's stock in First Bank & Trust Company[1] of Mt. Vernon, Illinois under a valid and enforceable contract. Defendants are required to sell the stock in the bank within one year from the date of this judgment, with the sale to be conducted under reasonable commercial standards.

This appeal by the co-executors ensued.

The co-executors argue:

1. The Kentucky Courts cannot assert personal jurisdiction over Mitchell in this case, and
2. Assuming the Kentucky Courts have personal jurisdiction over Mitchell, the alleged oral agreement is unenforceable under the Statute of Frauds.

Appellants apparently concede that there is sufficient evidence in the record to substantiate the finding of the trial court that Mitchell and Sayers did enter into an oral contract. They argue, however, that even if there was a con-

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[1]The judgment has been amended to reflect the new name of the bank — Mt. Vernon Bancorp, Inc.

tract, it was void and unenforceable under KRS 371.010, the Statute of Frauds, because it could not be performed within one year from July 17, 1975, the date of its execution. This argument is predicated upon the notion that the contract called for Sayers to stay at First Bank & Trust until its stock was saleable at a profit to Mitchell. However, the trial court specifically found that the contract called for Sayers to "Keep the First Bank & Trust Company open, or, 'get the ox out of the ditch.'" Contrary to the appellants' contention, there is adequate evidence in the record to support this finding. There was evidence, for example, to the effect that Mitchell feared in July of 1975 that First Bank & Trust would be closed unless its then chief executive officer was immediately replaced with a person satisfactory to the F.D.I.C. It could reasonably be inferred, from this evidence alone, that Sayers' main obligation under the contract was to keep First Bank & Trust Company from being closed. He performed that part of the contract within one year from July 17, 1975.

Appellants' main contention is that Daviess Circuit Court did not have personal jurisdiction over Mitchell when this lawsuit was filed. Mitchell, being a resident of Texas, is not subject to the jurisdiction of Kentucky courts unless our "long arm" statute, KRS 454.210(2)(a), is applicable; it provides:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
>
> 1. Transacting any business in this Commonwealth.

The purpose of the statute is to ensure that Kentucky courts comply with federal constitutional requirements of due process before asserting personal jurisdiction over non-resident defendants. Courts have interpreted Ken-

tucky's statute to extend to the outer limits of the due process clause. *See First National Bank of Louisville* v. *J. W. Brewer Tire Co.*, 680 F. 2d 1123 (6th Cir. 1982). Both sides agree that this Court, in *Tube Turns Division of Chemetron Corp* v. *Patterson Co., Inc.*, Ky. App., 562 S. W. 2d 99 (1978), accurately stated the test for meeting the constitutional and statutory requirements of due process:

> First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from defendant's activities there. Finally, the activities of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable.

Id. at 100. We believe all three criteria of *Tube Turns* have been met by Mitchell's actions in this case. First, he conducted extensive business in this Commonwealth. The co-executors cite *Lamar* v. *American Basketball Association*, 468 F. Supp. 1198 (S.D.N.Y. 1979), in support of their argument that Mitchell's activities as a shareholder and director of Central Bank & Trust Company and ONB do not constitute the transacting of business by Mitchell in Kentucky within the meaning of the "long arm" statute. The problem with this argument is that Mitchell's activities in Kentucky transcended, by far, representation of his corporate interests. He owned a controlling interest in Central Bank & Trust and ONB at the same time. He arranged for the purchase and sale of Central Bank & Trust and ONB in Kentucky. He financed the purchase of the two banks through Citizens Fidelity Bank & Trust Company of Louisville. We believe the evidence shows Mitchell's interests as a shareholder and director in the Kentucky banks to be secondary to his personal business of buying and selling them.

Second, the cause of action arose on account of the extensive activities of Mitchell in Kentucky. In addition to buying and selling banks in Kentucky, he formed the contract that is the subject of this lawsuit in Kentucky when Sayers accepted his telephone offer on July 17, 1975. 17 Am. Jur. 2d *Contracts* § 53 (1964). The contract caused activity in Kentucky because, pursuant to its terms, Sayers was required to sell the ONB stock, resign as senior vice-president and chief executive officer of ONB, and move from Owensboro to Mt. Vernon, Illinois. The executors argue that sale of the ONB stock was fully covered in a prior written agreement between Mitchell and Sayers. That is only partially true, because, although the prior written agreement did provide that Sayers would share in the profits of the ONB stock, it did not require Sayers to handle the sale, and it did not provide for a particular time of sale. The oral agreement required Sayers to sell the stock on behalf of Mitchell, and it mandated a speedy sale.

Finally, we believe Mitchell's activities in Kentucky, and the consequences caused by him in Kentucky, have a substantial enough connection with this Commonwealth to make the exercise of jurisdiction reasonable. "Both the first and second prongs are met when a dispute arises from a substantial business contract with a corporation based in another jurisdiction. The third factor looks to the extent of the forum state's interest and whether exertion of jurisdiction over the particular defendant is fair. When the first two elements are met, an inference arises that the third, fairness, is also present; only the unusual case will not meet this third criterion. Among other considerations, fairness is judged by whether the buyer (1) is an 'active' or 'passive' one (2) could foresee a foreign suit, and (3) has physical contacts with the forum state." *First National Bank of Louisville* v. *J. W. Brewer Tire Co., supra,* at 1126.

Again, Mitchell meets all the criteria. He was certainly an "active" participant in forming the oral contract with Sayers and creating the conditions in Kentucky that brought about ONB's role in the contract. Mitchell should have foreseen a lawsuit against him in Kentucky, because he had previously been sued in the United States District Court for the Western District of Kentucky by the United States Government on account of his banking activities in Daviess County. Such a suit should not have been considered onerous by Mitchell because during 1975, the year in which he made the contract with Sayers, he had frequent contacts with Owensboro, including trips for shareholder and directors' meetings of ONB.

In any event, Kentucky has an interest in seeing that contracts formed in this Commonwealth are carried out. "Failure to honor a contractual obligation incurred in a state cannot reasonably be said to be without consequence there. The effects of such a breach of contract on the general conduct of business may not be readily quantifiable, but they are, nevertheless, real." *Davis H. Elliott Co.* v. *Caribbean Utilities Co.,* 513 F. 2d 1176, 1181-82 (6th Cir. 1975).

Appellants also complain that the trial court adopted the findings of fact and conclusions of law prepared by Sayers' attorneys. We can tell by the transcript of evidence that the trial judge put an enormous amount of time and effort into this case. He very patiently allowed appellants' counsel to repeatedly argue the jurisdiction issue and he presided over several days of trial in a most deliberate and conscientious manner. We believe this issue is controlled by *Bingham* v. *Bingham,* Ky., 628 S. W. 2d 628, 629 (1982):

> There has been no showing that the decision-making process was not under the control of the trial judge,

nor that these findings and conclusions were not the product of the deliberations of the trial judge's mind. The evidence adduced at trial clearly supports the findings of fact and conclusions of law announced by the court and in the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility under CR 52.01, they are not to be easily rejected.

The judgment of the Daviess Circuit Court is affirmed. ALL CONCUR.

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APPENDIX C

DAVIESS CIRCUIT COURT

DIVISION I

81-CI-1242

LEW C. SAYERS - - - - - - - *Plaintiff*

v.

TEXAS AMERICAN BANK (Formerly Exchange Bank & Trust Company) and JOHN B. STIGALL, JR., as Independent Co-Executors of the Will of Milous Jackson Mitchell, deceased - - - *Defendants*

FINDINGS OF FACT
CONCLUSIONS OF LAW
JUDGMENT

This Court trial lasted six days. When the case was submitted for decision the Court requested that each side file a trial brief and a proposed Findings of Fact, Conclusions of Law and a Judgment. It was mutually agreed that the entire Court transcript would be prepared by the Court Reporter before the requested Briefs, Findings, Conclusions and Proposed Judgment would be submitted. All of the above requirements have now been completed and the case has been submitted to the Court for decision.

Now, being duly advised, the Court has read and considered the lengthy court record, the excellent trial briefs, and the proposed Findings of Fact and Conclusions of Law submitted by counsel for both parties. The Court hereby generally adopts and affirms the Findings of Fact and Concusions of Law #1, submitted by the attorneys for the Plain-

tiff which are copied herein as the Court's own Findings of Fact and Conclusions of Law. Reference is made herein to the various volumes of the trial record for evidence supporting the findings of the Court.

FINDINGS OF FACT

(1) On or about July 17, 1975, plaintiff, Lew C. Sayers, and defendants' decedent, M. J. Mitchell (also known as Milous Jackson Mitchell), entered into an oral agreement (Tr. Vol. I, page 33, lines 9-14; page 39, lines 15-18; Vol. II, page 236, lines 20-25; page 248, lines 19-25; page 249, lines 1-2; page 252, lines 17-25; page 253, lines 1-4; page 254, lines 11-25; page 255, lines 1-9).

(2) Sayers, on that date, was chief executive officer and senior vice-president of the Owensboro National Bank, earning a salary of $50,000 with additional fringe benefits (Tr. Vol. I, page 28, lines 10-23).

(3) Mitchell, on that date, was principal owner of the stock of the Owensboro National Bank, a sound and thriving bank. Mitchell also owned 62% or 266,600 shares of stock in First Bank & Trust Company of Mt. Vernon, Illinois, a bank in serious financial condition. His cost basis in this stock was $12.50 per share (Tr. Vol. I, page 31, lines 21-23; page 32, lines 11-23; page 94, lines 16-25; Vol. IV, page 452, lines 10-13).

(4) The oral contract entered into between Sayers and Mitchell on or about July 17, 1975, provided that Sayers was to negotiate the sale of Mitchell's stock in Owensboro National Bank, resign his position as chief executive officer and senior vice-president of Owensboro National Bank, move to Mt. Vernon and take the position of chief executive officer of First Bank & Trust Company and keep the bank open or, "get the ox out of the ditch" (Tr. Vol. I, page 33, lines 15-25; page 34, lines 1-4; page 93, lines 2-22).

In return for these services, Mitchell was to pay Sayers one-half the profit derived from the sale of his stock in First Bank & Trust Company of Mt. Vernon, Illinois (Tr. Vol. I, page 35, lines 18-25; page 36, lines 1-3; page 94, lines 9-15).

(5) The parties did not specify the duration of Sayers' employment at First Bank & Trust Company of Mt. Vernon, Illinois, but both parties expected Sayers' performance to be completed within one year (Tr. Vol. I, page 54, lines 14-18; Vol. III, pages 338-340).

(6) Sayers negotiated the sale of the Owensboro National Bank stock (Tr. Vol. I, pages 40-49; Gatton dep., pages 5-9), resigned his position at the Owensboro National Bank, moved to Mt. Vernon, Illinois (Tr. Vol. I, page 49, lines 5-8; page 52, lines 10-14), and became the chief executive officer and president at First Bank & Trust Company of Mt. Vernon, Illinois at a reduced salary of $25,000 per year (Tr. Vol. I, page 53, lines 21-25; page 54, lines 1-6).

(7) Sayers served as president of First Bank & Trust Company from November of 1975 until June of 1978 and as chief executive officer from October of 1975, until November of 1978 (Tr. Vol. I, page 71, lines 13-23; plaintiff's exhibit no. 9).

(8) Immediately upon assuming his duties at First Bank & Trust Company, Sayers made dramatic changes at the bank in performance of the contract, among them, instituting training programs, personnel changes and adopting new accounting procedures (Tr. Vol. I, page 63, lines 5-25; page 64, lines 1-22; page 67, lines 3-25; Vol. II, page 243, lines 1-11). Sayers personally supervised the loan department (Tr. Vol. II, page 243, lines 12-17). He switched computer companies, added a controller and hired a new external auditor (Tr. Vol. I, page 63, lines 5-25; page 64, lines 1-22).

(9) During Sayers' tenure as chief executive officer and president, and due primarily to his efforts, leadership and the changes he instituted, the bank was restored to a sound and prosperous financial condition (plaintiff's exhibit no. 22).

(10) Prior to his arrival, during the years 1973, 1974 and 1975, First Bank & Trust Company of Mt. Vernon, Illinois suffered losses in the amount of $340,403, $390,-536 and $869,075, respectively (plaintiff's exhibit no. 22).

(11) By January of 1976, the bank began to record a profit, less than one year after the parties entered into the contract. By September 9, 1976, First Bank & Trust Company reported a profitable eight months straight (Tr. Vol. 1, page 65, lines 21-24; plaintiff's exhibit no. 7).

(12) In 1976, the losses for the bank were reduced to $63,645. By 1977 and 1978, the bank profits were raised to $156,645 and $627,000, respectively (plaintiff's exhibit no. 22).

(13) Although Sayers continued to serve as chief executive officer and president of the bank, by preventing the closing of the bank upon his arrival, immediately instituting personnel and policy changes (Tr. Vol. I, page 63-64), and successfully placing the bank in a profit-making position (plaintiff's exhibit no. 7; plaintiff's exhibit no. 22), Sayers fully performed his part of the oral contract within a period of one year.

(14) Sayers received no payment for his arrangement of the sale of Mitchell's stock in Owensboro National Bank to Bill Gatton (Tr. Vol. I, page 104, lines 8-12).

(15) Mitchell denied the execution of the contract and refused to compensate Sayers for saving his investment in First Bank & Trust Company of Mt. Vernon, Illinois (Tr. Vol. IV, page 454, lines 8-9; page 565, lines 5-11).

CONCLUSIONS OF LAW

(1) The oral contract entered into between Sayers and Mitchell on or about July 17, 1975, is a binding and enforceable contract. KRS 371.010 (7).

(2) Under the terms of the contract, Sayers is entitled to one-half the profits from the sale of Mitchell's stock in First Bank & Trust Company of Mt. Vernon, Illinois.

(3) Plaintiff, having fully performed the contract with nothing remaining but his payment, this contract will be enforced against defendants according to its terms. Cf. *Saylers* v. *Kenmont Coal Company,* 226 Ky. 655, 11 S. W. 2d 705 (1928).

(4) Although the parties placed no duration date on Mitchell's performance of this contract, it is within the equitable powers of the Court to place a termination date on this contract in enforcing its terms. *East Tennessee Telephone Company* v. *Paris Electric Company,* 156 Ky. 762, 162 S. W. 530 (1914).

(5) In view of the death of M. J. Mitchell and the obvious need to settle his estate, this Court will exercise its equitable powers in granting specific performance of the contract. Defendents are ordered to sell the stock in First Bank & Trust Company of Mt. Vernon, Illinois within one year from the date of this judgment, with the sale to be conducted under reasonable commercial standards.

JUDGMENT

It is Hereby Ordered and Adjudged that Sayers is entitled to one-half the profits from the sale of Mitchell's stock in First Bank & Trust Company of Mt. Vernon, Illinois under a valid and enforceable contract. Defendants are required to sell the stock in the bank within one year from the date of this judgment, with the sale to be conducted under reasonable commercial standards.

This Judgment was prepared by the Court and entered of record on this the 6th day of April, 1983, at the costs of the Defendants. This is a final and appealable Judgment and there is no reason for delay.

/s/ Henry M. Griffin

HENRY M. GRIFFIN, JUDGE
Daviess Circuit Court, Division I

Copies of this Findings of Fact, Conclusions of Law, and Judgment were this date delivered by the Court to:

Hon. Morton Holbrook
Hon. Lizbeth Ann Tully
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and

Hon. William E. Rummage
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and a copy mailed to:

Hon. John B. Stigall, Jr.
STIGALL, MAXFIELD, COLLIER & MURPHEY
500 Kirby Building
1509 Main Street
Dallas, Texas 75201

A True Copy Attest:
Pat Hardesty, Clerk
Daviess Circuit Court,
By /s/ D. Wade D.C.

APPENDIX D

454.210. Personal Jurisdiction of courts over nonresidents—Process how served—Venue. (1) As used in this section, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this Commonwealth.

(2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's

1. Transacting any business in this Commonwealth;

2. Contracting to supply services or goods in this Commonwealth;

3. Causing tortious injury by an act or omission in this Commonwealth;

4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth;

5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this Commonwealth, if he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth;

6. Having an interest in, using, or possessing real property in this Commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a nonresident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated;

7. Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting.

8. Committing sexual intercourse in this state which intercourse causes the birth of a child when:

a. The father or mother or both are domiciled in this state, or

b. There is a repeated pattern of intercourse between the father and mother in this state, or

c. Said intercourse is a tort or a crime in this state.

(b) When jurisdiction over a person is based solely upon this section, only a claim arising from acts enumerated in this section may be asserted against him.

(3)(a) When personal jurisdiction is authorized by this section, service of process may be made on such person, or any agent of such person, in any county in this Commonwealth, where he may be found, or on the secretary of state who, for this purpose, shall be deemed to be the statutory agent of such person.

(b) The clerk of the court in which the action is brought shall issue a summons against the defendant named in the complaint. The clerk shall execute the summons by sending by certified mail a true copy to the secretary of state and shall also mail with the summons an attested copy of plaintiff's complaint. The secretary of state shall, within seven

(7) days of receipt thereof in his office, mail the copy of the summons and complaint to the defendant at the address given in the complaint. The letter shall be posted by certified mail, return receipt requested and shall bear the return address of the secretary of state. The clerk shall make the usual return to the court, and in addition the secretary of state shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the secretary of state and the action shall proceed as provided in the Rules of Civil Procedure.

(c) The clerk mailing the summons to the secretary of state shall mail to him, at the same time, a fee of four dollars ($4.00), which shall be taxed as costs in the action.

(4) When the exercise of personal jurisdiction is authorized by this section, any action or suit may be brought in the county wherein the plaintiff resides or where the cause of action or any part thereof arose.

(5) A court of this Commonwealth may exercise jurisdiction on any other basis authorized in the Kentucky Revised Statutes or by the Rules of Civil Procedure, notwithstanding this section.